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Attorneys for Defendants RE/MAX EXTREME,  
EDWARD C. REED and BARBARA P. REED

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \* \*

TAE-SI KIM, an individual, and	)	CASE NO. 2:09-CV-2008
JIN-SUNG HONG, an individual,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
ADAM B. KEARNEY, an individual;	)	DEFENDANTS RE/MAX EXTREME,
EDWARD C. REED, an individual;	)	EDWARD C. REED AND BARBARA
BARBARA R. REED, an individual;	)	P. REED'S MOTION TO
REED TEAM, dba RE/MAX EXTREME, a	)	DISMISS
Nevada general partnership; FIRST	)	
AMERICAN TITLE, a foreign	)	
corporation; GINA THOMPSON, an	)	
individual; ALVERSON, TAYLOR,	)	
MORTENSEN & SANDERS, a Nevada law	)	
firm; and, the Estate of JAMES L.	)	
ZEMELMAN, ESQ.	)	
	)	
Defendants.	)	

COME NOW, Defendants RE/MAX EXTREME, EDWARD C. REED and  
BARBARA P. REED, by and through their attorneys, OLSON, CANNON,  
GORMLEY & DESRUISSEAUX, and hereby move to dismiss Plaintiffs'  
Twenty-Third Cause of Action for Breach of Fiduciary Duties,  
Twenty-Sixth Cause of Action for Breach of Contract, and Twenty-  
Seventh Cause of Action for Breach of the Duty of Good Faith and

Law Offices of  
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1 Fair Dealing as under no set of facts as pled are Plaintiffs  
2 entitled to relief from these moving Defendants on those cause of  
3 action.

4 This motion is made and based on the attached points and  
5 authorities, all papers and pleadings on file herein, and such  
6 oral argument as the court may entertain at the hearing of the  
7 motion.

8 DATED this 14<sup>th</sup> day of December, 2009.

9 OLSON, CANNON, GORMLEY &  
10 DESRUISSEAU

11 By /s/ Michael E. Stoberski  
12 MICHAEL E. STOBERSKI, ESQ.  
13 Nevada Bar No. 004762  
14 ZACHARY J. THOMPSON, ESQ.  
15 Nevada Bar No. 011001  
16 9950 West Cheyenne Avenue  
17 Las Vegas, Nevada 89129  
18 Attorneys for Defendants RE/MAX  
19 EXTREME, EDWARD C. REED and  
20 BARBARA P. REED

21 POINTS AND AUTHORITIES

22 I.

23 INTRODUCTION

24 Tae-Si Kim ("Kim") and Jin-Sung Hong ("Hong") (collectively  
25 "Plaintiffs") filed a Complaint on October 15, 2009, which named  
26 Edward C. Reed ("Mr. Reed"), Barbara R. Reed ("Mrs. Reed"), Reeds  
27 and RE/MAX Extreme ("RE/MAX Extreme") (collectively "RE/MAX  
28 Extreme Defendants"), among others. For the purposes of this  
motion only, the facts alleged in Plaintiffs' Complaint are to be  
accepted as true. In the Complaint, Plaintiffs allege that the

1 RE/MAX Extreme Defendants represented the Plaintiffs as their  
2 real estate licensees in a transaction to purchase property known  
3 as APN # 177-19-801-008 ("Subject Property").

4 Plaintiffs entered into a contract for the purchase of the  
5 Subject Property. After entering into the purchase agreement,  
6 Plaintiffs were not able to obtain conventional financing in time  
7 for the closing on the Subject Property, which necessitated other  
8 arrangements. Plaintiffs allege that while representing  
9 Plaintiffs in the transaction, they directed Plaintiffs to use a  
10 mortgage broker named Adam Kearney ("Kearney").

11 Kearney and the Plaintiffs allegedly agreed to an  
12 arrangement whereby the right to purchase the Subject Property  
13 under the purchase agreement would be assigned to Kearney.  
14 Kearney in turn would lend Plaintiffs approximately \$100,000,  
15 which would then be applied toward the purchase price of the  
16 property, and Kearney would finance the remainder of the purchase  
17 price by obtaining a loan from Cumorah Credit Union. Plaintiffs  
18 would then have the right or the option to repurchase the Subject  
19 Property from Kearney after they were able to obtain conventional  
20 financing and other conditions. This agreement was reduced to  
21 writing in an Option Agreement, which was allegedly drafted by  
22 counsel for RE/MAX International, Inc. The RE/MAX Extreme  
23 Defendants were not parties to the Option Agreement.

24 Plaintiffs allege that they ultimately attempted to exercise  
25 their rights under the Option Agreement. They were able to  
26 obtain the money to pay off the remainder of the amounts due to  
27 Kearney, which they allege they in fact paid to Kearney.  
28 Kearney, in turn, was supposed to open escrow, transfer title,

1 and pay off any liens, including the Cumorah Credit Union lien.  
2 Plaintiffs allege that Kearney failed to pay off the lien and  
3 absconded with their funds. Plaintiffs contend that Kearney  
4 failed to transfer clear and marketable title to them in  
5 violation of the Option Agreement. Plaintiffs allege that this  
6 failure to pay off the lien ultimately led to a foreclosure on  
7 the Subject Property. As a result of this foreclosure,  
8 Plaintiffs allege that they lost the money paid to Kearney and  
9 the money that they had placed down on the property. Plaintiffs  
10 contend that these actions, among other representations and  
11 directives, were part of a fraudulent scheme among the RE/MAX  
12 Extreme Defendants and Kearney.

13 Subsequently, on October 15, 2009, Plaintiffs filed their  
14 Complaint against the RE/MAX Extreme Defendants repeatedly  
15 alleging, among other things, that the RE/MAX Extreme Defendants  
16 breached fiduciary duties. However, under Nevada law, real  
17 estate licensees are not subject to liability based on common law  
18 duties, which include fiduciary duties. When real estate  
19 licensees are acting in that capacity in a real estate  
20 transaction they are subject only to the duties codified in NRS  
21 Chapter 645. See NRS 645.251. Plaintiffs' Twenty-Third Cause of  
22 Action for Breach of Fiduciary Duties is predicated upon a common  
23 law fiduciary duty. Since real estate licensees are not required  
24 to comply with such common law principles, Plaintiffs have failed  
25 to state a claim upon which relief may be granted against the  
26 licensees Mr. Reed and Mrs. Reed. Consequently, dismissal is  
27 appropriate.

28 . . .

1           Additionally, dismissal is appropriate on Plaintiffs'  
2   Twenty-Sixth Cause of Action for Breach of Contract. In that  
3   action, Plaintiffs essentially allege that the Option Agreement  
4   was breached. (See Complaint, §§ 282-283.) However, Plaintiffs  
5   have already correctly noted and pled that the RE/MAX Extreme  
6   Defendants are not parties to the Option Agreement. (Complaint,  
7   § 29.) Since the RE/MAX Extreme Defendants are not parties to  
8   the Option Agreement, the Option Agreement cannot serve as the  
9   basis for a breach of contract claim against them. Consequently,  
10   under no set of facts as alleged by Plaintiffs can they be  
11   entitled to relief on their breach of contract claim, making  
12   dismissal appropriate. Accordingly, dismissal of Plaintiffs'  
13   Twenty-Seventh Cause of Action for Breach of the Duty of Good  
14   Faith and Fair Dealing is appropriate because the claim is  
15   predicated on the Option Agreement of which the RE/MAX Extreme  
16   Defendants were not a party.

17. II.

18	STANDARD
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Pursuant to Federal Rule of Civil Procedure 12(b)(6), a claim may be dismissed for failure to state a claim upon which relief may be granted. "Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.'" *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955 (2007)). The pleading standard of Rule 8 does not require detailed factual allegations; however, "it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.*

1 (citing *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955). "A pleading  
2 that offers 'labels and conclusions' or 'a formulaic recitation  
3 of the elements of a cause of action will not do.'" *Id.* (citing  
4 *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955). "Nor does a complaint  
5 suffice if it tenders 'naked assertion[s]' devoid of 'further  
6 factual enhancement.'" *Id.* (citing *Twombly*, 550 U.S. at 557, 127  
7 S.Ct. 1955).

8 A complaint will not survive a motion to dismiss for failure  
9 to state a claim upon which relief may be granted where the  
10 complaint does not "contain sufficient factual matter, accepted  
11 as true, to 'state a claim to relief that is plausible on its  
12 face.'" *Id.* (citing *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955).  
13 To determine whether the complaint contains sufficient factual  
14 matter to state a claim, the Court first should identify which  
15 pleadings are to be accepted as true. *See id.* at 1950. For the  
16 purposes of a motion to dismiss, the Court must take all of the  
17 factual allegations in the complaint as true; however, the Court  
18 is not bound to accept as true a legal conclusion couched as a  
19 factual allegation. *Id.* at 1949-50 (citing *Twombly*, 550 U.S. at  
20 555, 127 S.Ct. 1955). In other words, "[t]hreadbare recitals of  
21 the elements of a cause of action, supported by mere conclusory  
22 statements, do not suffice." *Id.* at 1949.

23 After identifying the pleadings, if any, that are to be  
24 accepted as true for the purposes of the motion to dismiss, the  
25 Court "should assume their veracity and then determine whether  
26 they plausibly give rise to an entitlement to relief." *Id.* at  
27 1950. For a claim to be plausible on its face, the plaintiff  
28 must plead "factual content that allows the court to draw the

1 reasonable inference that the defendant is liable for the  
2 misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556, 127  
3 S.Ct. 1955). "The plausibility standard is not akin to a  
4 'probability requirement,' but it asks for more than a sheer  
5 possibility that a defendant has acted unlawfully." *Id.* "Where  
6 a complaint pleads facts that are 'merely consistent with' a  
7 defendant's liability, it 'stops short of the line between  
8 possibility and plausibility of "entitlement to relief."'" *Id.*  
9 (citing *Twombly*, 550 U.S. at 557, 127 S.Ct. 1955).

### 10 III.

#### 11 BACKGROUND FACTS

12 On or about June 24, 2005, while Mr. and Mrs. Reed were  
13 acting as Plaintiff Hong's real estate licensees, Hong entered  
14 into a real estate purchase contract to acquire the Subject  
15 Property for approximately \$435,000. (Complaint, § 43.)  
16 Plaintiffs placed \$10,000 in earnest money down, which at some  
17 point became non-refundable. (Complaint, § 45 and Complaint  
18 Exhibit 6.) The closing on the Subject Property was to occur by  
19 August 12, 2005. (See Complaint, § 443.)

20 Subsequently, Hong attempted to obtain conventional  
21 financing. Hong received pre-approval in a letter from Lee J.  
22 Meyer of AAA Mortgage Corporation on July 1, 2005, for  
23 conventional financing for the purchase of the Subject Property.  
24 (Complaint, § 47.) Unfortunately, the Plaintiffs, or Hong in  
25 particular, were not able to obtain conventional financing for  
26 the Subject Property. The Reeds informed the Plaintiffs that the  
27 financing had fallen through. (Complaint, § 48.) Plaintiffs  
28 allege that the Reeds then advised and instructed Plaintiff Hong

1 to obtain alternative financing. (Complaint, § 49). Plaintiffs  
2 contend that the Reeds further instructed Plaintiffs to engage  
3 Adam Kearney ("Kearney"), who was a licensed mortgage broker at  
4 the time. (Complaint, § 51.)

5 Plaintiffs contacted Kearney and he allegedly offered to  
6 obtain a loan for approximately \$315,000 of the remainder of the  
7 purchase price to acquire the Subject Property by the August 12,  
8 2005 closing date. (Complaint, § 78.) Plaintiffs allege that on  
9 or about August 10, 2005, Kearney and the Reeds instructed Hong  
10 to assign his right to purchase the property under the initial  
11 purchase agreement to Kearney. (Complaint, § 65.) On that date,  
12 Hong entered into an Option Agreement, which was drafted by  
13 counsel for RE/MAX International, Inc. as an accommodation.  
14 (Complaint, § 69-70.)

15 The Option Agreement recitals indicated that Hong had  
16 located the Subject Property but that Hong did not have  
17 sufficient time to apply for and obtain financing for the  
18 proceeds required to close escrow on the Subject Property, which  
19 was set to take place on or before August 12, 2005. (See Exhibit  
20 1 to Plaintiffs' Complaint.) In spite of that, Hong desired the  
21 right to acquire the Subject Property, so the Option Agreement  
22 was entered to salvage the transaction so that it could proceed  
23 to a timely close of escrow. (See Exhibit 1 to Plaintiffs'  
24 Complaint.) To allow the transaction to proceed to a timely  
25 close of escrow, Kearney agreed to assume the initial purchase  
26 agreement, take title to the Subject Property, finance the  
27 property, and grant Hong the option to purchase fee title to the  
28 Subject Property. (See Exhibit 1 to Plaintiffs' Complaint.) In



1 other words, Kearney agreed to finance the purchase of the  
2 Subject Property and to take title in his name, while Hong would  
3 be given the opportunity to purchase the Subject Property back  
4 from Kearney. Hong would also be required to place additional  
5 money down to cover the portion of the purchase price that was  
6 not financed. (See Exhibit 1 to Plaintiffs' Complaint.)

7 Plaintiffs allege that Kearney and the Reeds informed  
8 Plaintiffs that the Plaintiffs would have to pay additional money  
9 down of \$100,000 by the scheduled closing date of August 12,  
10 2005, in order to prevent losing the \$10,000 deposit that had  
11 been placed when the initial purchase agreement had been entered  
12 into. (Complaint, § 53.) Plaintiffs also allege that on or  
13 about August 7, 2005, Kearney and the Reeds informed Plaintiff  
14 that an additional \$17,394 was required from the Plaintiffs.  
15 (Complaint, § 61.) As with the rest of the transaction, the  
16 Plaintiffs did not have the ability to obtain the additional  
17 money to be placed down prior to August 12, 2005. (Complaint, §  
18 54.) Consequently, other arrangements had to be made in order to  
19 acquire the additional \$100,000.

20 Plaintiffs allege that Kearney and the Reeds advised the  
21 Plaintiffs to obtain a hard-money loan of \$100,000 through  
22 Kearney to cover the amount needed for the additional earnest  
23 money deposit. (Complaint, § 57.) On or about August 12, 2005,  
24 Plaintiffs allege that Kearney provided the \$100,000 to Hong in  
25 exchange for a Note and associated compensation, including seven  
26 points and ten percent interest. (Complaint, § 58; see Complaint  
27 Exhibit 7.) Plaintiffs do not allege that the RE/MAX Extreme  
28 Defendants purchased the Note or in any other way were a party to

1 the Note. Regardless, Plaintiffs allege that they obtained the  
2 additional money to be placed on the Subject Property for the  
3 closing as provided for in the Option Agreement.

4 Under the terms of the Option Agreement, Hong could exercise  
5 the option within one year by paying \$10,000 to Kearney and the  
6 remaining principal and any interest accrued on the Note as of  
7 the date of closing. (Complaint, § 79.) Plaintiffs allege that  
8 they complied with those terms. (Complaint, § 79.) Plaintiffs  
9 allege that on March 14, 2006, they delivered \$330,000 to  
10 Kearney. (Complaint, 107.) They allege that since they  
11 complied with the terms and executed the option, Kearney was  
12 required to open an escrow with First American Title Company,  
13 convey the Subject Property to Hong by grant, bargain, and sale  
14 deed, have the escrow agent issue a policy of title insurance,  
15 and reconvey the Subject Property to Hong free and clear of the  
16 loan. (Complaint, § 80.)

17 Plaintiffs allege that Kearney failed to perform as required  
18 by the Option Agreement. (Complaint, § 80.) They allege that he  
19 failed to perform pursuant to the terms of the Option agreement  
20 by failing to clear title to the Subject Property and by failing  
21 to transfer clear and marketable title to Plaintiffs. Plaintiffs  
22 recognize that the RE/MAX Extreme Defendants were not parties to  
23 the Option Agreement. (Complaint, § 29.)

24 Later, Plaintiffs were allegedly informed by an employee of  
25 First American Title Company that the Subject Property was not  
26 clear of liens. (Complaint, § 126.) Plaintiffs allege that they  
27 hired an attorney, who informed the Plaintiffs in July of 2006  
28 that the liens had been cleared and that the Subject Property had

1    been transferred with clear and marketable title to Plaintiffs.  
 2    (Complaint, § 139.) Plaintiffs contend that the RE/MAX Extreme  
 3    Defendants also informed them that the title had been cleared.  
 4    (Complaint, § 119.)

5        Plaintiffs allege that title had not in fact been cleared  
 6    and that the Subject Property was still subject to a lien from  
 7    Cumorah Credit Union, which was the entity that had allegedly  
 8    provided the loan to Kearney to finance the purchase of the  
 9    Subject Property. (See Complaint, § 140.) Plaintiffs allege  
 10   that instead of paying off the Cumorah Credit Union loan as  
 11   Kearney was required to do before transferring title to  
 12   Plaintiffs, Kearney instead absconded with the \$315,000 in  
 13   principle, commissions, and other fees.

14        Plaintiffs allege that this failure to pay off the Cumorah  
 15   Credit Union loan ultimately led to a foreclosure on the Subject  
 16   Property. (See Complaint, § 146.) They allege that on December  
 17   16, 2008, they received a notice of foreclosure for the lien, and  
 18   the Subject Property was ultimately foreclosed upon. (See  
 19   Complaint, §§ 146, 150.) They allege that this foreclosure  
 20   essentially wiped out Plaintiffs' prior cash investment that was  
 21   placed down on the Subject Property as well as the money that was  
 22   paid to Kearney to exercise their option under the contract.  
 23   (See Complaint, § 146.)

24    . . .

25    . . .

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28    . . .

## III.

ARGUMENT

A. PLAINTIFFS' CLAIM FOR BREACH OF FIDUCIARY DUTIES AGAINST THE RE/MAX EXTREME DEFENDANTS SHOULD BE DISMISSED BECAUSE THE CLAIM IS PRECLUDED BY STATUTE.

NRS 645.251 removed any requirement for a licensee to comply with common law duties in Nevada. Specifically, NRS 645.251 states, "[a] licensee is not required to comply with any principles of common law that may otherwise apply to any of the duties of the licensee as set forth in NRS 645.252, 645.253 and 645.254 and the regulations adopted to carry out those sections." NRS 645.251. In other words, a real estate licensee is not subject to causes of action based upon common law duties; instead, real estate licensees are subject only to causes of action based upon the statutory duties contained in NRS 645.252, 645.253 and 645.254.

A claim for breach of fiduciary duty is based on a common law fiduciary duty. See *Frantz v. Johnson*, 116 Nev. 455, 465, 999 P.2d 351, 357-58 (2000) (recognizing breach of fiduciary duty as a common law cause of action). In the real estate licensee context, such a common law fiduciary duty would have arisen based upon a relationship between the parties where trust and confidence is imposed. Although the legislature could have retained such a common law duty and the principles developed in relation thereto, it chose not to by adopting NRS 645.251, which eliminated such common law duties and supplied statutory duties instead. Now, real estate licensees in Nevada are subject only to the duties set forth in NRS 645.252, 645.253 and 645.254 when acting in their roles as real estate licensees. See NRS 645.251.

1 In this case, Plaintiffs pled that they expected trust and  
2 confidence in the integrity and fidelity of the RE/MAX Extreme  
3 Defendants, which is how, in part, fiduciary duties would have  
4 arisen at common law. (Complaint, § 265.) Plaintiffs pled that  
5 the RE/MAX Extreme Defendants voluntarily undertook those duties  
6 and that they breached them. (See Complaint, §§ 264-266.)  
7 Plaintiffs did not identify a statutory basis for their breach of  
8 fiduciary duties claim, which is likely because fiduciary duties  
9 are not contemplated under NRS Chapter 645. Given that  
10 Plaintiffs did not identify a statutory basis for the claim and  
11 that they appear to have pled that fiduciary duties arose as a  
12 result of placing trust and confidence in the RE/MAX Extreme  
13 Defendants, Plaintiffs' claim is based on a common law duty.  
14 Real estate licensees are not required to comply with such common  
15 law duties when acting as a licensee in a transaction. As a  
16 result, under no set of facts as pled can Plaintiffs be entitled  
17 to relief on their breach of fiduciary duties claim.  
18 Consequently, dismissal for failure to state a claim is  
19 appropriate with respect to Plaintiffs' Twenty-Third Cause of  
20 Action for Breach of Fiduciary Duties against the RE/MAX Extreme  
21 Defendants.

22 B. PLAINTIFFS' CLAIM FOR BREACH OF CONTRACT AGAINST THE RE/MAX  
23 EXTREME DEFENDANTS SHOULD BE DISMISSED BECAUSE THE RE/MAX  
24 EXTREME DEFENDANTS ARE NOT PARTIES TO THE OPTION CONTRACT  
ALLEGEDLY BREACHED.

25 In Nevada, where a party does not allege facts necessary to  
26 establish the formation of a contract between the parties, that  
27 party's breach of contract claim necessarily fails. See *Snyder*  
28 *v. Viani*, 110 Nev. 1339, 1344, 885 P.2d 610, 613 (1994). With

1 respect to the formation of a contract, "[b]asic contract  
2 principles require, for an enforceable contract, an offer and  
3 acceptance, meeting of the minds, and consideration." *May v.*  
4 *Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). Since a  
5 breach of contract claim requires the existence of an enforceable  
6 contract, which in turn requires an offer and acceptance, meeting  
7 of the minds, and consideration, the complaint must at least  
8 generally allege facts sufficient to support such elements.

9 In this case, the only contract Plaintiffs have alleged to  
10 have been breached is the Option Agreement. (Complaint, §§ 281-  
11 283.) However, Plaintiffs have explicitly acknowledged in their  
12 Complaint that the RE/MAX Extreme Defendants were not parties to  
13 the Option Agreement. (See Complaint, § 29.) Since they were  
14 not parties to the Option Agreement under Plaintiffs' own facts,  
15 there certainly could not have been an offer or acceptance,  
16 meeting of the minds, or consideration to establish the existence  
17 of a valid and binding contract among the Plaintiffs and the  
18 RE/MAX Extreme Defendants that could form the basis for a breach  
19 of contract claim as pled. As a result, dismissal of Plaintiffs'  
20 Twenty-Sixth Cause of Action for Breach of Contract is  
21 appropriate with respect to the RE/MAX Extreme Defendants.

22 C. PLAINTIFFS' CLAIM FOR BREACH OF THE DUTY OF GOOD FAITH AND  
23 FAIR DEALING SHOULD BE DISMISSED BECAUSE THE OPTION CONTRACT  
24 DID NOT GIVE RISE TO THE DUTY WITH RESPECT TO THE RE/MAX  
DEFENDANTS.

25 It is well settled in Nevada that every contract imposes the  
26 duty of good faith and fair dealing upon the contracting parties.  
27 *State, University and Community College System v. Sutton*, 120  
28 Nev. 972, 989, 103 P.3d 8, 19 (2004); see also *Hilton Hotels*

1 Corp. v. Butch Lewis Productions, Inc., 109 Nev. 1043, 1046, 862  
2 P.2d 1207, 1209 (1993) ("It is well established within Nevada  
3 that every contract imposes upon the *contracting parties* the duty  
4 of good faith and fair dealing.") (emphasis added). In other  
5 words, the covenant of good faith and fair dealing only arises  
6 between or among parties to a contract, not non-parties.

7 In this case, Plaintiffs' allege that the RE/MAX Extreme  
8 Defendants, among others, breached a duty of good faith and fair  
9 dealing by contravening the spirit and intent of the Option  
10 Agreement. (See Complaint, § 286.) In other words, Plaintiffs  
11 are alleging that a duty of good faith and fair dealing existed  
12 based upon the Option Agreement. As discussed above, Plaintiffs  
13 have acknowledged that the RE/MAX Extreme Defendants were not  
14 parties to the Option Agreement. (See Complaint, § 29.) Since  
15 they were not parties to the contract that gave rise to the  
16 alleged duty of good faith and fair dealing, under Nevada law,  
17 they could not be held liable under a theory of breach of the  
18 duty of good faith and fair dealing. As a result, under no set  
19 of facts as pled by Plaintiffs could they be entitled to recover  
20 against the RE/MAX Extreme Defendants for breach of the duty of  
21 good faith and fair dealing arising from the Option Agreement.  
22 Thus, dismissal of Plaintiffs' Twenty-Seventh Cause of Action for  
23 Breach of the Duty of Good Faith and Fair Dealing is appropriate.

#### 24 IV.

#### 25 CONCLUSION

26 Plaintiffs have repeatedly alleged that the RE/MAX Extreme  
27 breached fiduciary duties. Under Nevada law, real estate  
28 licensees are not subject to common law duties, including

1 fiduciary duties, when they are acting in that capacity in a real  
2 estate transaction; rather, they are subject only to the duties  
3 codified in NRS Chapter 645. Plaintiffs pled the breach of  
4 common law fiduciary duties though required compliance with such  
5 duties have been eliminated. Consequently, dismissal of  
6 Plaintiffs' Twenty-Third Cause of Action for Breach of Fiduciary  
7 Duties for failure to state a claim upon which relief may be  
8 granted is appropriate.

9 Dismissal of Plaintiffs' Twenty-Sixth Cause of Action for  
10 Breach of Contract is also appropriate. The basis of Plaintiffs  
11 breach of contract claim is the Option Contract. Plaintiffs  
12 recognized and pled that the RE/MAX Extreme Defendants were not  
13 parties to the Option Agreement. Since were not parties to the  
14 Option Agreement, the Option Agreement cannot serve as the basis  
15 for a breach of contract claim against them. As a result,  
16 Plaintiffs' Twenty-Sixth Cause of Action for Breach of Contract  
17 should be dismissed for failure to state a claim upon which  
18 relief may be granted as under no set of facts as pled could  
19 Plaintiffs be entitled to relief.

20 Dismissal of Plaintiffs' Twenty-Seventh Cause of Action for  
21 Breach of the Duty of Good Faith and Fair Dealing is appropriate  
22 because the claim is based upon an implied duty arising from the  
23 Option Agreement. In Nevada, the implied duty of good faith and  
24 fair dealing arises only between the parties to a contract. The  
25 RE/MAX Extreme Defendants were not a party the Option Contract.  
26 As a result, Plaintiffs' Twenty-Seventh Cause of Action for  
27 Breach of the Duty of Good Faith and Fair Dealing should be  
28 . . .



1 dismissed for failure to state a claim upon which relief may be  
2 granted.

3 DATED this 14<sup>th</sup> day of December, 2009.

4 OLSON, CANNON, GORMLEY &  
5 DESRUISSEAU

6  
7 By /s/ Michael E. Stoberski  
8 MICHAEL E. STOBERSKI, ESQ.  
9 Nevada Bar No. 004762  
10 ZACHARY J. THOMPSON, ESQ.  
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14 Attorneys for Defendants RE/MAX  
15 EXTREME, EDWARD C. REED and  
16 BARBARA P. REED  
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CERTIFICATE OF SERVICE VIA EFP PROGRAM

I hereby certify that on this 14<sup>th</sup> day of December, 2009,  
I did serve, via the Court's CM/ECF System, a copy of the above  
and foregoing DEFENDANTS RE/MAX EXTREME, EDWARD C. REED AND  
BARBARA P. REED'S MOTION TO DISMISS:

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